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IN THE

Supreme Court of the United States

ADRIAN MARTELL DAVIS,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari to the Washington Supreme Court

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONER

PAMELA HARRIS
Co-Chair *Amicus Committee*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
Washington, D.C. 20006
(202) 383-5386

SHERYL MCCLOUD
Co-Chair *Amicus Committee*
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
810 Third Ave, Suite 421
Seattle, WA 98104
(206) 623-1302

TIMOTHY P. O'TOOLE
Counsel of Record
CATHARINE F. EASTERLY
ANDREA ROTH
CORINNE BECKWITH
PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200

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INTEREST OF *AMICI CURIAE*

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys nationwide, along with 78 state and local affiliate organizations numbering 28,000 members in 50 states.[1] *Amicus curiae* Washington Associa-

[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity,

tion of Criminal Defense Lawyers (WACDL) is a not-for-profit corporation with a membership of nearly 700 attorneys practicing criminal defense law in Washington State. *Amicus curiae* Public Defender Service for the District of Columbia (PDS) represents indigent criminal defendants. WACDL participated in the state court litigation in this case. NACDL and PDS participated in this case at the certiorari stage, submitting briefs that urged this Court to grant review both in this case and in *Hammon v. Indiana*, Docket No. 05-5705.

Central to our role as criminal defense lawyers, *amici* assist "accused" persons in exercising their Sixth Amendment right to "be confronted with the witnesses against" them. U.S. Const. amend. VI. In many cases handled by *amici*, the right to confrontation still serves its traditional function of ensuring the adversarial mode of a criminal trial, where witnesses testify in open court, before the trier-of-fact, subject to cross-examination. But *amici* have too often been required to represent defendants in cases like Mr. Davis' and Mr. Hammon's—cases in which the government's proof consists of nothing more than the recitation of accusatory post-incident statements made by an absent witness to a police officer or a 911 operator. From a criminal defense perspective, such "witnessless" prosecutions[2] present grave dangers: They allow the accuser to level charges from somewhere other than the open courtroom, thereby escaping public scrutiny; defense counsel is never permitted to perform her most valuable function for her client—cross-examination of witnesses face-to-face in open court before the fact-finder; and the fact-finder is pre-

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other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

[2] Such prosecutions are also known as "victimless" or "evidence-based" prosecutions. But because there are, in fact, alleged victims in these cases (whether they appear at trial or not), and because all cases are "evidence-based," *amici* use the term "witnessless" in order to reflect the essence of these prosecutions, which is their lack of percipient witnesses at trial.

vented from serving as the real arbiter of the reliability of the accusations.

Because such "witnessless" prosecutions were generally forbidden in the United States for almost two hundred years under the commonly accepted understanding of the right to confrontation and because they gained some measure of approbation only in the wake of this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), *amici* are the first generation of American defense lawyers to have experience representing their clients under such adverse conditions. Based on our knowledge of the inherent problems with these trials, *amici* urge this Court to continue down the path already charted in *Crawford v. Washington*, 541 U.S. 36 (2004), by reviving the common-law understanding of the Sixth Amendment where in-court confrontation of percipient witnesses is again the norm. *Amici* believe that the only way to accomplish this goal is to adopt a bright-line definition of "testimonial" statements protected by the Confrontation Clause that, at the very least, specifically requires confrontation at trial for all accusatory statements made to known government agents. *Amici* support Mr. Davis and Mr. Hammon in hopes that this Court will use their cases to adopt such a rule.

STATEMENT OF THE CASE

The only evidence the prosecution had to support the charge that Adrian Davis was responsible for Michelle McCottry's assault was the tape of Ms. McCottry's telephone interview with a 911 operator—a tape the prosecution told the jury constituted Ms. McCottry's "testimony." *State v. Davis*, 111 P.3d 844, 850 (Wash. 2005). *Amici* adopt Petitioner's statement of the case, with the additional observation that everything that is constitutionally impermissible about the lower court's approval of the "witnessless" prosecution in *Hammon* based on an unconfronted statement to a responding officer is similarly impermissible in this "witnessless" prosecution based on Ms. McCottry's unconfronted statements to a 911 operator.

SUMMARY OF ARGUMENT

In the brief *amici* have submitted simultaneously in support of Mr. Hammon, *amici* urge this Court to adopt a categorical rule that, at the very least, requires confrontation at trial for all accusatory statements made to known government agents. As *amici* explain, such a bright-line rule: (1) best reflects the original purpose of the Confrontation Clause, revived by *Crawford*, to promote and preserve the adversarial mode of criminal trial, (2) ensures confrontation for precisely those statements that the government will rely upon most heavily, and hence the statements that the defendant will most need to challenge and the statements that the fact-finder will find most material to its assessment of guilt, (3) establishes a clear rule that, in contrast to *Roberts* and many lower-court, post-*Crawford* analyses of "testimonial," is easily, efficiently and predictably applied, (4) negates any perverse incentives that encourage police to alter or abridge their investigative procedures to gather "unconfrontable" statements, and (5) is immune to the ever-present pressure from the government to shield its witnesses from the rigors of the adversarial system.

Such a bright-line rule must encompass accusatory statements made over the phone to 911 operators. 911 operators interview callers and record their statements with the object of providing this information to the police, and thus they functionally act as agents of the police. As Mr. Davis' case demonstrates, the statements that 911 operators obtain as a result of their interviews look like testimony, sound like testimony, are treated as testimony, and indeed are *called* testimony at trial. Thus, to exempt them from the process for the admission and consideration of testimony that the Constitution commands—presentation in person, in open court, before the defendant and the trier-of-fact, and subject to cross-examination—would only undermine our adversarial mode of criminal justice.

Indeed, the use of 911 tapes and transcripts in lieu of live testimony may present an even greater threat to our adversary system than the responding officer recitations in *Hammon* because the fact-finder hears the accuser's exact words (and if there is a tape, the accuser's actual voice) as if the accuser were there in court testifying for the prosecution, but the accuser is totally shielded from the rigors of confrontation. Moreover, any attempt to distinguish between 911 calls and responding officer statements—by allowing some sort of "emergency" exemption from the general adversarial model for 911 calls—cannot survive scrutiny and will inevitably encourage a race to the evidentiary bottom. The more hasty and incomplete a statement is the more likely it is to be presented to the fact-finder without confrontation. This cannot be what the Framers sought to achieve with the Confrontation Clause or what this Court sought to achieve with its decision in *Crawford*.

ARGUMENT

A CATEGORICAL DEFINITION OF "TESTIMONIAL" STATEMENTS THAT REQUIRES CONFRONTATION AT TRIAL FOR ALL ACCUSATORY STATEMENTS TO KNOWN GOVERNMENT AGENTS MUST INCLUDE ACCUSATORY STATEMENTS TO 911 OPERATORS.

Mr. Davis' case demonstrates why any fair definition of "testimonial" statements must include unconfronted accusations made to 911 operators. Any statement that brings the exact words of an accuser's narrative statement into the courtroom, as tapes and transcripts of 911 calls do—*i.e.*, any statement that looks like testimony, sounds like testimony, and functions as testimony at trial—should be subject to the process for the admission and consideration of testimony that the Constitution commands: presentation in person, in open court, before the defendant and the trier-of-fact, and subject to cross-examination.

Narrative statements to a 911 operator, like the statements made at the scene to a responding police officer at issue in *Hammon*, have all the components of "testimonial" statements. These sorts of accusatory statements set the machinery of the criminal justice system in motion toward the ultimate end of securing a conviction. In other words, by making an accusatory statement over the phone to a 911 operator, a caller-accuser is inviting a government response that predictably results in the accused's loss of liberty—whether or not the accuser is consciously aware of this fact, and whether or not this is the accuser's primary purpose.[3] Accusatory statements in 911 calls, like responding officer statements, are then passed on to the prosecution, and, as direct evidence of guilt, are generally used at trial as a critical element of prosecution's case. By the same token, these accusatory statements are the evidence that the defense most needs to probe and challenge in order to mount a defense, and are the very statements that the fact-finder weighs most heavily in deliberating to reach a verdict.

For these reasons, the use of unconfronted accusatory statements to 911 operators are just as much a threat to our adversarial system of criminal justice as accusatory statements to responding officers. In both instances, the defendant is not permitted to come "face to face" with the accuser, and defense counsel is unable to meaningfully challenge the accuser's memory, perception, bias, or veracity. And in both instances, the use of out-of-court accusations prevents the fact-finder from making a meaningful assessment of the reliability of the accusations, in accordance with its constitution-

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[3] Given public service campaigns encouraging citizens to "call 911" to report crimes, *see* Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1194-95 (2002), there is every indication that the government intends to use this information for crime-fighting, which just illustrates how such accusations are "testimonial" in any meaningful sense of the term.

ally mandated role. In short, when either 911 calls or responding officer statements are admitted into evidence in the absence of the accuser coming into court and taking the stand, the trial does not look or function as the Framers intended.

Taped or transcribed 911 calls are potentially even more damaging to our adversarial system than out-of-court statements relayed by police officers, because the fact-finder hears the accuser's exact words as if the witness were there in court testifying for the prosecution, but the accuser is totally shielded from questioning by defense counsel. An accuser's own words in a 911 call, documented in a tape or transcript, are likely to have more force than the testimony of responding police officers relaying their summaries and imperfect recollections of undocumented oral accusations. Accusations made in a 911 call are even more shielded from adversarial testing. At least when an accuser makes an oral statement to a police officer, the prosecution must put the officer on the stand to relay the statement and this officer may be asked about his or her observations and perceptions of the accuser at the time the statement was made.[4] But when an accuser's statements to a 911 operator are taped or transcribed, all the prosecutor has to do is press play on the audio equipment or provide the fact-finder with a copy of the transcript.[5]

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[4] As *amici* note in *Hammon*, however, even the presence of this police officer at trial is of limited utility because the officer will be trained to record and repeat in court precisely what needs to be said to ensure the unconfronted statement's admission. *See Amici's* Merits Brief in support of *Hammon* at 15-16. Moreover, cross-examining a responding police officer who is merely relaying second-hand information will be of little help to the defense because the officer cannot know if the account of the incident is complete or accurate and does not have full, independent information about the relationship between the accuser and the defendant, or about other potential sources of the accuser's bias. *Id.* Likewise, putting a 911 operator on the stand would be equally unavailing.

[5] Although the tape or transcript must be authenticated, an authenticating witness will only be able to vouch that the tape or transcript is an

Defense counsel cannot question a tape recording or a transcript. Thus, with 911 calls, the fact-finder hears—in the accuser's own words—no more and no less than the government has trained its agents to elicit, but defense counsel is completely stymied. In this respect, accusations in 911 calls are functionally indistinguishable from witness statements made in transcribed grand jury proceedings or taped police interrogations—two types of statements this Court explicitly recognized as "testimonial" in *Crawford*. *See* 541 U.S. at 68.

Audiotaped 911 calls raise one additional concern because the fact-finder hears the accuser's actual voice. In effect, a recording of a 911 call is the closest that the prosecution can get to live testimony without actually putting the accuser on the stand. *See* Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without the Victim*, 39 Prosecutor 18, 21 (Feb. 2005) (Identifying the 911 tape as "[o]ne of the most helpful pieces of evidence in an evidence-based prosecution," because the fact-finder gets to hear the accuser's voice directly). This confusing resemblance to live testimony is likely why the trial prosecutor in Mr. Davis' case told the jury that Ms. McCottry had "left you her testimony," in the form of her recorded 911 call, "on the day that this happened." *See* Petitioner's Cert. Petition at 5. From the government's perspective, Ms. McCottry's 911 call so much resembled the evidentiary presentation the government would have made had Ms. McCottry appeared in court and answered questions on direct examination, it *was* the equivalent of testimony.

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actual tape or transcript of a call received by 911; he or she will have no ability to address the contents of the call. Indeed, the defense here deemed cross-examination of an authenticating witness to be of such little value that it stipulated to the admission of the 911 tape, while continuing to protest Mr. Davis' inability to confront his actual accuser, Ms. McCottry.

Just imagine if, at Sir Walter Raleigh's trial, the prosecution had had the technological capacity to play a tape of phone call of Lord Cobham leveling his accusations. Even if this call had been made seconds after Cobham claimed to have learned of Raleigh's allegedly treasonous conduct, this recorded statement would not have been any more reliable, or any more amenable to probing by Raleigh, but it almost certainly would have been more (unfairly) compelling to the fact-finder. Had the Framers had access to 911 technology, they surely would have recognized that such statements triggered the right to confrontation. *See Crawford*, 541 U.S. at 52 n.3 (where there is no "direct evidence" of the Framers' reaction to modern-day limitations on confrontation, courts should employ a "reasonable inference" analysis to preserve confrontation rights).

The counterargument that a statement made in a 911 interview, by its very nature, raises less need for confrontation than statements to responding officers because a 911 call is typically a "call for help" or a response to "immediate danger" cannot survive scrutiny. *But see Davis*, 111 P.3d at 849, 851 (Petitioner's Cert. App. 5, 7). First, this characterization wrongly assumes that the caller-accuser has a single motive—to seek aid[6]—when the caller-accuser may, in fact, have multiple motives, including the motive to initiate criminal proceedings. Second, this characterization simply assumes that everything that the caller says is true—*e.g.*, the caller needs assistance *because* the defendant has in fact hurt her—and "is merely a reliability analysis in disguise." *See People v. Walker*, 697 N.W.2d 159, 170 (Mich. App.) (Cooper, J. dissenting), *appeal granted*, 697 N.W.2d 527 (Mich. 2005). As such, it is just as inconsistent and manipulable as the

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[6] Such an assumption is on shaky ground in this case where Ms. McCottry "never ask[ed] for help," *Davis*, 111 P.3d at 854 (Sanders, J. dissenting), and when asked if she needed an "aid car," told the 911 operator, "no, I'm alright." Petitioner's Cert. Petition at 3.

judicial reliability tests under *Ohio v. Roberts*. With the caller-accuser absent from the courtroom, there is no way for judges to confirm the status of a statement as a "cry for help." *See Crawford*, 541 U.S. at 66 ("only cross-examination could reveal" a witness' "perception of her situation"). Thus, judges are left to their own, subjective devices to identify these statements. In short, their only means of distinguishing a "cry for help" from a mistaken or false accusation is that they know a "cry for help" when they see it.

No case demonstrates lower courts' overwillingness to affix the "cry for help" label to 911 calls better than *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Sup. Ct. 2004), which has the dubious distinction of being the "most frequently cited decision" post-*Crawford* on the admissibility of unconfronted statements made in 911 interviews. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 773 n. 136 (2005). In *Moscat*, the court held that 911 calls are generally made close in time to the alleged crime, and are motivated not by a desire to bring criminal charges against the defendant but a "desire . . . to be rescued from immediate peril." 777 N.Y.S.2d at 879. Accordingly, the court held that the "electronically augmented equivalent of a loud cry for help" purportedly made by the complainant to a 911 operator did not trigger the right to confrontation. *Id.* at 880. Later investigation revealed, however, that this influential decision had no factual foundation. In fact, "[t]he person who called 911 was actually a neighbor, not the victim" and "the call was made nine hours after the assault." Lininger, 91 Va. L. Rev. at 774 n.136. The prosecution eventually abandoned the case, *id.*, but *Moscat* is still on the books and is still cited as persuasive precedent. *See, e.g., Hammon v. State*, 829 N.E.2d 444, 454 (Ind. 2005); *State v. Forrest*, 596 S.E.2d 22, 26 (N.C. App. 2004), *aff'd*, 611 S.E.2d 833 (N.C. 2005).

As a practical matter too, the need for in-court adversarial testing of 911 calls is just as great if not more so than the

need for in-court adversarial testing of statements made to police officers responding to the report of a crime. Many of these statements are made in a hurried fashion when the speaker is under stress—factors that have a demonstrated tendency to cause errors in witness perception. *See* Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004); Charles A. Morgan, III, et. al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L. & Psychiatry 265 (2004). Also, 911 conversations are generally shorter, less comprehensive, and less accurate than even statements made in a "preliminary" interview (the boundaries of which are undefined and may be quite expansive[7]) with a responding police officer. And, because the speaker does not come "face to face" with the 911 operator, there is a greater level of anonymity with 911 calls—an aspect which the Framers certainly recognized as inimical to reliable statements. *See Lee v. Illinois*, 476 U.S. 530, 540 (1986) (Clause promotes "society's interest in having the accused and accuser engage in an open and even contest in a public trial . . . by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals"); *California v. Green*, 399 U.S. 149, 179 (1970) (Clause was intended to "constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"); *Mattox v. United States*, 156 U.S. 237, 242 (1895) (Framers

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[7] For example, in the District of Columbia, the "preliminary" investigation of a domestic violence situation includes: victim and suspect interviews; witness interviews; obtaining names, addresses and phone numbers of witnesses; taking photographs of any injuries; seizing any evidence; determining if there is a temporary or civil protective order outstanding and obtaining copies thereof; and recovering any telephone answering machine recordings of any threats received by the victim or witnesses. *See* Metropolitan Police Department, District of Columbia, *General Order 304.11 for Intrafamily Offenses* (Jan. 1998).

rejected inquisitorial model because it did not allow face-to-face confrontation and cross-examination of one's accusers).

In fact, statements made on the telephone to 911 operators have proven particularly susceptible to error and even abuse. *See, e.g., United States v. Wilmore*, 381 F.3d 868, 869 (9th Cir. 2004) (911 caller falsely accused husband of robbing abortion clinic because she feared he would sell a Christmas gift for their children to get money for drugs); *United States v. Washington*, 263 F. Supp. 2d 413, 420 (D. Conn. 2003) (failure to disclose to defense that 911 caller had prior conviction for making a false report and was known to be a "persistent" liar); *State v. Brown*, 903 P.2d 459, 757-59 (Wash. 1995) (911 call erroneously admitted as excited utterance, given caller's testimony that she had decided to fabricate portion of her story before making telephone call); *Smith v. United States*, 666 A.2d 1216, 1224-25 (D.C. 1995) (failure to disclose to defense that key eyewitness had admitted that claim to 911 operator that robber had stuck a gun in his face—which was admitted as excited utterance—was false); *People v. Simpson*, 656 N.Y.S.2d 765, 767 (N.Y. App. 1997) (911 caller lied in order to get the police to respond more quickly to her home); *Keller v. State*, 431 S.E.2d 411, 411-12 (Ga. App. 1993) (false report of robbery both in 911 call and to responding police officers); *see also* Friedman & McCormack, 150 U. Pa. L. Rev. at 1197 (describing phenomenon in domestic violence cases of "the race to the phone by abusers who have been through the system and who know that they will be in a much better position if they are the first to call" the police for assistance).

Finally, if this Court creates an exception for 911 calls as "cries for help," police and prosecutors will inevitably alter their practices and 911 calls will become an even greater engine for "witnessless" criminal prosecutions. Prosecutors and police have already made efforts to adjust investigative practices post-*Crawford* so as to shoehorn accusatory state-

ments to known government agents into a perceived confrontation exception for "excited utterances" made in "preliminary" investigations. *See Amici's* Merits Brief in support of *Hammon* at 17-21. Thus, if the rationale of *Davis* is allowed to stand, it is hardly farfetched to imagine the adoption of a new police policy of calling into every house before entering, with the stated object of determining if anyone needs aid, in order to interview witnesses telephonically before interviewing them face to face. Likewise, if this Court were to endorse the "preliminary" aspect of an investigation as the touchstone of the "testimonial" inquiry, one would expect the government to expand the scripts of questions to callers developed under *Ohio v. Roberts*, *see, e.g.*, Petitioner's Cert. App. 21-23, so that 911 operators obtain the maximum amount of information from the caller-accuser while skirting the "testimonial" boundary. Alternatively, if this Court were to deem the breadth of questioning determinative, one would expect a push for 911 operators to abridge their script of questions in order to avoid disturbing the "call for help" label. Any of these responses would elevate the goal of production of "unconfrontable" evidence for trial over the proper investigation of crime and the promotion of public safety. *See* Lininger 91 Va. L. Rev. at 776 ("the Hobson's choice between presenting evidence and responding to emergencies must be avoided").

In sum, the admission of unconfronted accusatory statements to a 911 operator, like the admission of unconfronted accusatory statements to a responding police officer, subverts the bedrock confrontation guarantee that witness testimony be presented live, in court, before the trier-of-fact, and subject to cross-examination. Accordingly, a bright-line rule that accusatory statements to known government agents are testimonial statements that trigger the right to confrontation should extend to both statements alike.

CONCLUSION

For the reasons set forth above and in *Amici's* Merits Brief in support of Mr. Hammon, this Court should declare that all accusatory statements to known law enforcement officials—including statements made to 911 operators—are testimonial and, applying this categorical rule, should reverse Mr. Davis' conviction.

Respectfully submitted,

PAMELA HARRIS
Co-Chair *Amicus Committee*
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
Washington, D.C. 20006
(202) 383-5386

SHERYL MCCLOUD
Co-Chair *Amicus Committee*
WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
810 Third Ave, Suite 421
Seattle, WA 98104
(206) 623-1302

TIMOTHY P. O'TOOLE
Counsel of Record
CATHARINE F. EASTERLY
ANDREA ROTH
CORINNE BECKWITH
PUBLIC DEFENDER SERVICE FOR
THE DISTRICT OF COLUMBIA
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200